IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 496 of 1997

Harishankar C. Yadav .. Appellant

versus

Ramshankar C. Yadav .. Respondents

...

Mr.S.G. Deshmukh for the appellant.

Mr.R.S. Datar for the respondents

CORAM : B.H. MARLAPALLE,J

DATED : 19th October 2005

ORAL JUDGEMENT :

1. This appeal arises from the order passed by the learned IVth Addl. District Judge at Thane in Civil Appeal No.2 of 1993 whereby the judgement and decree passed by the learned Joint Civil Judge, Sr. Division at Thane on 31.7.1992 in Regular Civil Suit

no.246 of 1984 came to be set aside and the suit was remanded to the Court of Civil Judge, Sr. Division at Thane. The plaintiff was ordered to value the suit for Rs.2,95,000/- and pay the Court fees on that valuation. While admitting this appeal, the impugned order passed by the lower appellate Court was stayed.

2. As per the plaintiff, he had taken on monthly lease some time in 1969-70 from one Rama Kalu Parad, resident of Panch Pakadi, Bhatwadi, Thane, three plots admeasuring 60’ x 20, 60’ x 20’ and 50’ x 20’ and he constructed three chawls consisting of 29 rooms and one stable admeasuring 20’ x 40’ on the said plots. Out of these 29 rooms, 27 were given on rent to different families and remaining 2 rooms were occupied by the plaintiff and defendant till 1977. The plaintiff was collecting rent so long as he was staying in the suit chawl named as "Shankar Sheth chawl" but in the year 1978, he shifted from the suit chawl and went to reside at Ambika Nagar. He therefore, asked the defendant who was his elder brother to collect the rent on his behalf from 27 tenants. The plaintiff further contends that till the year 1983, the defendant collected the rent and passed it on to the plaintiff but thereafter he

stopped handing over the rental amount to the plaintiff. On the contrary, the defendant claimed that he was the owner of the suit chawl and therefore, the plaintiff issued an Advocate's notice on 1st February 1984 to the defendant (Exhibit-62) followed by another notice dated 22nd February 1984 (Exhibit-63). The reliefs prayed for in the suit originally filed were as under:-

> a) It be ordered and declared that the plaintiff is the absolute owner of suit property known as Shankar Seth Chawl and stable situated in Survey No.438 at Panchapakhadi, Bhatwadi, Kisan Nagar No.3, Wagle Estate, Road No.16, Thane and has every right to enjoy the fruits of it.
>
> b) The defendants, his agents, servants, representatives, associates, hirelings, family members or person or persons claiming through him be restrained by an order of permanent perpetual injunction order

of this Hon’ble Court from interfering with plaintiff’s possession, suit property or any part thereof in any manner whatsoever.

Clause 14 of the plaint regarding payment of Court Fees clarifies that the suit property was in possession of the plaintiff and the relief claimed for in the suit could not be evaluated in terms of money and therefore, he affixed the Court fees stamp of Rs.30/- under section 6(i)(j) of the Bombay Court Fees Stamp Act 1959.

3. There is no dispute that the plaintiff failed in obtaining temporary injunction against the defendant and Miscellaneous Civil Appeal No.104 of 1984 also failed. In the year 1985, as per the plaintiff, the defendant had given one of the three chawls to a builder by name Shri Makwana for development. The plaintiff filed Regular Civil Suit no.617 of 1985 against the defendant and the Thane Municipal Corporation in which the application for temporary injunction was rejected and further appeal

also failed. The builder proceeded and constructed a multi-storeyed building with 38 blocks and in the same building, all the old tenants were accommodated. The plaintiff had also issued notice to another builder and developer by name Pushpalata Kinge on or about 19.4.1990 as she had started construction by demolishing the remaining two chawls. The plaintiff had filed suit against the said Pushpalata Kinge and prayed for injunction which was not granted and the construction proceeded. A five storeyed building did come up during the pendency of the suit. Admittedly, these suits filed are no more pending as at present.

4. The plaintiff submitted an application at Exhibit-14 on or about 20th September 1991 and prayed for amendment of the suit. The said application was allowed by the trial Court on 19.2.1992. By the said amendment, prayer clause 'ab' came to be added and consequently, clause no.14-A clarified the issue of the valuation of the suit. They are reproduced as under:-

(ab) It be ordered and declared

that the construction carried out pucca or temporary of 3 buildings in place of suit chawl and stable on leasehold land of the plaintiff by the defendant his agents, representatives during the pendency of the suit is illegal, unwarranted and to be removed on the cost of the defendant and plaintiff is entitled for vacant and peaceful possession of the land i.e. suit site.

14-A The defendant, his agents demolished the chawls and stable of the plaintiff and therefore the plaintiff claimed vacant possession of the land and valued the suit at annual rent of Rs.360/- and necessary court fee stamp of Rs.36/- is affixed hereto in addition to the previous stamps."

On these amendments being allowed, the trial Court framed three additional issues i.e. 9(a) to 9(c) and

they read as under:-

9(a) Does the defendant prove that the suit is not properly valued as per the market value of the suit property?

9(b) Whether this Court has pecuniary jurisdiction to entertain and decide this suit?

9(c) Does the defendant prove that the suit is bad-in-law for want of non joinder of necessary party?

. On the first additional issue, the trial Court held against the defendant, that he failed to prove that the suit was not properly valued and on the second additional issue, the trial Court held that it had pecuniary jurisdiction to entertain and decide the suit, whereas on the third additional issue, the trial Court held that the suit was not hit for non-joinder of necessary party.

5. The lower appellate Court on the other hand framed the following two preliminary issues.

1) Whether it is permissible to entertain the objection of the point of valuation and pecuniary jurisdiction?

2) Whether the plaintiff had properly and correctly value the suit?

. The first issue has been answered in the affirmative and second issue in the negative. As per the lower appellate court, the suit ought to have been valued for Rs.2,95,000/- and the plaintiff should have paid the Court fees on the said amount. The appellate Court therefore proceeded to hold that the the learned Civil Judge, Jr. Division, had decreed the suit when he did if not have the pecuniary jurisdiction and therefore, remanded the suit for being admitted to the Court of the learned Judge, Sr.Division at Thane, by setting aside the decree impugned.

6. Mr.Deshmukh, the learned Counsel for the plaintiff submitted that the view taken by the lower

appellate court is erroneous moreso when the said court itself observed that the appellant was not able to point out precisely as to how failure of justice had occasioned by entertaining and deciding the suit by the learned Civil Judge, Jr.Division. Mr.Deshmukh referred to the provisions of section 21(2) of the Code of Civil Procedure and submitted that in the absence of finding of failure of justice, occasioned at the hands of the trial court, it was not permissible for the lower appellate court to remand the suit to be presented to the Court of Civil Judge, Sr.Division and in support of his arguments, he placed reliance on the decision in the case of R.S. P. Finance Co. Pvt. Ltd. Vs. Shree Vallabh reported in AIR 1993 SC 2094. As per Mr.Deshmukh, even the valuation of Rs.2,95,000/- made by the lower appellate court on the basis of the valuers report dated 13th April 1987 was erroneous in as much as three chawls and one stable which were constructed by the plaintiff were already demolished and the plaintiff had claimed the possession of the open plot as a lessee whereas the said valuation made by the valuer was that of the demolished structure.

7. The learned counsel for the respondent

defendant on the other hand has supported the impugned remand order. As per him, the valuation was required to be made on the basis of the amended plaint and if so made, the value of the building standing on the suit plot would be much more than Rs.2,95,000/- and therefore, the suit could not have been tried and decided by the learned Civil Judge, Jr. Division. Trying and deciding the suit by the learned Civil Judge, Jr. Division is itself a failure of justice in as much as he was not the competent court to entertain and decide the suit on its amendment which was carried out after the oral depositions of the plaintiff and defendant were recorded. PW no.3 Ashok, Valuer was examined on 27th and 28th April 1992 after the suit was amended by the order dated 19.2.1992. It is thus clear that this appeal revolves around the preliminary issues regarding pecuniary jurisdiction and the valuation of the suit. The added/amended prayer clause "ab" in the plaint as reproduced hereinabove infact claimed three different reliefs. viz.

(a) the construction carried out at the instance of the defendant i.e. the first building constructed by Mr.Makwana and the second building constructed by

Pushpalata Kinge be declared as illegal and unwarranted,

(b) the suit buildings may be demolished at the cost of the defendant and

(c) it be declared that the plaintiff is in vacant and peaceful possession of the suit plots.

8. The valuation of the suit on its amendment pursuant to the order dated 19.2.1992 was required to be considered on the basis of the newly constructed buildings and the substantial reliefs claimed, on amendments.

. As per the plaintiffs own depositions in his cross examination before the trial court, Mr.Makwana built the first multi-storeyed building which contained 38 blocks and Pushpalata Kinge built the second five storeyed building. The plaintiff wanted this construction to be declared as illegal and the buildings to be demolished. It was necessary for the Court below to have the valuation of these buildings

done rather than considering the valuation report dated 13.4.1987 as submitted by DW No.3 and if the valuation was done taking into consideration these new buildings it would be certainly much more than Rs.2,05,000/-.

9. As noted hereinabove, the tenements in the newly constructed buildings have been occupied by the allottees who may be tenants or owners of the respective tenements. The plaintiff prayed for demolition of these structures/buildings and therefore, these occupants are necessary parties to the suit. Issue no.9(c) has been rightly answered by the trial Court in the affirmative and therefore on remand, if the plaintiff desires to proceed with the suit, it is imperative that all these occupants of the tenements in both the buildings are impleaded as defendants.

10. In the premises, the order of remand passed by the lower appellate court does not call for any interference and on the other hand, it will have to be modified for valuation of the suit as well as for impleading the individual tenement holders as defendants. This appeal therefore, fails and the

same is hereby dismissed. Regular Civil Suit no.246 of 1984 is remanded to the Court of Civil Judge, Sr.Division at Thane and the issue of valuation of the suit shall be considered on the lines stated in this judgement, after the individual tenement holders are impleaded as additional defendants. The plaintiff shall take steps for impleading them within a period of six weeks from today, failing which it will be presumed that he has abandoned the suit or given up his claim.

11. No costs. Interim order if any stands vacated.

B.H. MARLAPALLE, J